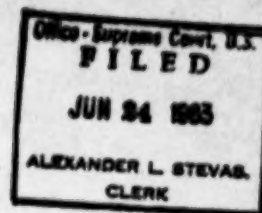


ORIGINAL



NO. 82-6498

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

DELMA BANKS, JR.,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

LESLIE A. BENITEZ*
Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant
Attorney General

PAULA C. OFFENHAUSER
Assistant Attorney General

NANCY M. SIMONSON
Acting Chief,
Enforcement Division

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

* Attorney of Record

QUESTION PRESENTED

- I. DID THE TRIAL COURT ERR IN EXCLUDING FOR
CAUSE TWO VENIREMEN IN VIOLATION OF THE
DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S.
510 (1968)?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION.	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT.	2
I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION	2
II. THE TRIAL COURT DID NOT ERR IN EXCLUDING FOR CAUSE TWO VENIRE- MEN IN VIOLATION OF THE DOCTRINE OF <u>WITHERSPOON V. ILLINOIS</u> , 391 U.S. 510 (1968)	3
CONCLUSION.	5

INDEX OF AUTHORITIES

Cases

Adams v. Texas, 448 U.S. 28 (1980).	3
Banks v. State, 643 S.W.2d 129 (Tex.Crim.App. 1982)	1
Boulden v. Holman, 394 U.S. 478 (1969).	3
Davis v. Georgia, 429 U.S. 122 (1976)	3
Witherspoon v. Illinois, 391 U.S. 510 (1968).	i,2,3,5

Statutes

28 U.S.C. §1257(3).	1
Article 37.071, V.A.A.C.P.	2
Rule 17, Rules of the Supreme Court	2

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered November 3, 1982, is reported at 643 S.W.2d 129 (Tex.Crim.App. 1982) and is attached to the petition as Petitioner's Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claim upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on May 22, 1980, in Bowie County, Texas, for the murder of Richard Wayne Whitehead, while in the course of committing robbery. Trial began on September 22, 1980, and on September 30, 1980, the jury found Petitioner guilty of the capital offense. On October 1, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted to Article 37.071, V.A.A.C.P. Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which, on November 3, 1982, affirmed the conviction and sentence. Rehearing was denied on January 5, 1983.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

The record in the instant case reflects no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Each of the two veniremen excluded for cause would have been unable to serve as fair and impartial jurors, based upon their opposition to the imposition of the death penalty. As such, no constitutional error is presented and this Court should decline to review this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS
UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on the writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are

special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented herein.

II.

THE TRIAL COURT DID NOT ERR IN EXCLUDING FOR CAUSE TWO VENIREMEN IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held, inter alia, that in a capital trial, no venireman could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. 522-23 n.21. See also, Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 28 (1980).

As the state appellate court held, the record reflects that each of these two veniremen were properly excluded because she would have been unable to serve as a fair and impartial juror consistent with Witherspoon principles.

Venireman Amy O. Rogers (SF 491-510) twice stated that under no circumstances could she vote to impose the death penalty (SF 494, 495). She twice claimed that there was no set of facts, regardless of how horrible or gruesome, that could change her mind (SF 495). Under examination by defense counsel, she stated that she could follow the court's instructions and answer the questions from the evidence. However, in response to questioning by the court, venireman Rogers stated that her answers to the court's questions would be influenced by her knowledge that answering a question in a certain way would result in the court imposing the death penalty (SF 501). On redirect examination by the prosecution, she unambiguously reiterated on three occasions

that under no circumstance could she vote to impose the death penalty (SF 503, 505, 506) and that she could not take part in a proceeding in which the death penalty were assessed (SF 504, 506).

Petitioner contends that because venireman Rogers responded affirmatively that if chosen as a juror in this case or any case, she would follow the judge's instructions and would answer any questions given by the judge from the evidence heard in the courtroom, the exclusion violated Witherspoon. It is beyond question that venireman Rogers unambiguously and unequivocally responded on seven separate occasions that she would automatically vote against the death penalty, regardless of what occurred at trial. Further, she responded that her answers to the court's questions would be influenced by knowledge that the court would impose the death penalty, and unequivocally responded that she could not take part in a proceeding that would give a person the death penalty. Her response to defense counsel's general question, that as a conscientious citizen, would she in this case or any case follow the judge's instructions and would answer the questions from the evidence heard, in no way indicates a willingness to subordinate her expressed convictions and to take an oath to decide this case truthfully on the evidence. Rogers' responses were sufficient to permit her exclusion consistent with constitutional principles.

Venireman Juanita M. Swanger (SF 1210-1223), unequivocally stated that she would automatically vote against imposition of the death penalty, regardless of the facts (SF 1216) and that no set of facts, regardless of how horrible or gruesome, would change her mind (SF 1216). In response to the state's question as to whether she could set aside her personal feelings and convictions and follow the law as given by the court, venireman Swanger at first was uncertain (SF 1217). When pressed by the prosecutor, however, she maintained that because of her firm convictions against the death penalty, she did not believe that

she could set aside her personal convictions and follow the court's instructions (SF 1217). She unequivocally stated that she could not be a fair and impartial juror and rule according to the law and evidence (SF 1218). On cross-examination, the defense counsel explained that the function of the jury is to hear the evidence and to answer the court's questions from the evidence (SF 1221). He further explained that the judge imposes the sentence, based on the jury's answers (SF 1221).

Petitioner now contends that exclusion of venireman Swanger violated Witherspoon because she stated that if seated as a juror, she would follow the court's instructions. This position is untenable. Nowhere in the voir dire did defense counsel explain that under Texas law, capital jurors would have to answer statutory special issues, and if all are answered affirmatively, an automatic death sentence would be imposed. Nor did defense counsel inquire into whether Swanger could follow the court's instructions under those circumstances. The record clearly reflects that Swanger unequivocally and unambiguously asserted that she would automatically vote against imposition of the death penalty regardless of the facts, that she could not set aside her expressed convictions and follow the court's instructions, and that she could not rule according to the law and evidence. Thus, her exclusion did not violate Witherspoon.

As the state appellate court found, the exclusions of each of these veniremen presents no Witherspoon violation. As such, this Court should decline to review Petitioner's claims.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

NANCY M. SIMONSON
Assistant Attorney General
Acting Chief,
Enforcement Division



PAULA C. OFFENHAUER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT